SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1026

GEORGE ZIMMERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

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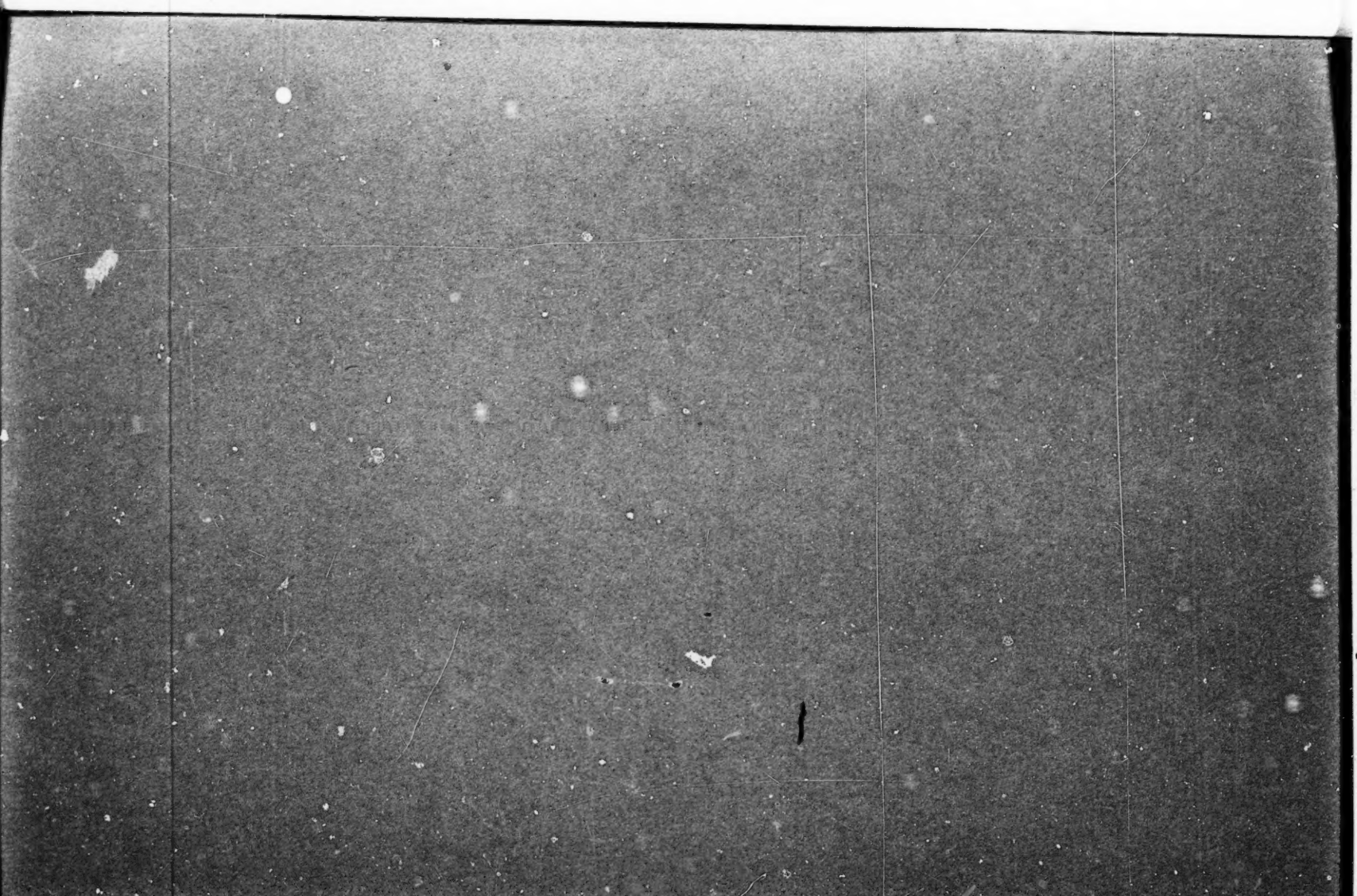

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OCTOBER TERM, 1968.

No. _____.

GEORGE ZIMMERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-captioned case on January 8, 1968.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the district court, denying petitioner's motion for new trial, was filed on April 22, 1966. The opinion is unreported and is printed in the Appendix attached hereto, *infra*, p. 17.

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming petitioner's conviction and the denial of his motion for new trial, is reported at 374 F. 2d 241 (1967) and is printed in the Appendix attached hereto, *infra*, p. 20.

The memorandum opinion of the district court, filed on January 22, 1968, denying petitioner's motion to vacate and reconsider the earlier denial of his motion for new

trial on the basis of newly discovered evidence, is unreported and is printed in Appendix *infra*, 35.

The opinion of the circuit court of appeals, affirming the decision rendered by the district court on January 22, 1968, is not yet reported. It is attached hereto in Appendix *infra*, p. 43.

STATEMENT OF JURISDICTION.

The judgment of the circuit court of appeals, affirming the denial of petitioner's motion for reconsideration of a motion for new trial on the basis of newly discovered evidence, was answered on January 8, 1968. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a defendant has forfeited the right to adequate and effective appellate review of the denial of a motion for new trial on the basis of newly-discovered evidence, where substantial testimony was presented in support of that motion, where the record of the hearing at which such testimony was heard became unavailable as a result of the death of the court reporter who recorded the hearing, and where neither the defendant nor his retained counsel intentionally abandoned the right to adequate and effective appellate review of the denial on a motion for new trial.

2. Whether a defendant has forfeited his right to adequate and effective appellate review of the denial of a motion for new trial on the basis of newly-discovered evidence and the exclusion of evidence offered in support of that motion, where the excluded evidence consisted of testimony of an attorney who claimed to have information which would exonerate defendant of the offenses upon

which he had been convicted, where the attorney was barred from disclosing that information on the ground that it had been acquired in the context of an attorney-client relationship from a client who was deceased at the time of hearing, where the death of the court reporter who recorded the hearing rendered the record which demonstrated the basis for the defendant's constitutional claim unavailable for appellate review, and where neither the defendant nor his attorney intentionally abandoned the right to adequate and effective appellate review of the issues raised.

3. Whether a defendant in a criminal case must be afforded a second hearing on a motion for new trial on the basis of newly-discovered evidence where the record of the first hearing on that motion was rendered unavailable by the death of the court reporter, where diligent effort of counsel failed to produce a stenographer capable of transcribing the notes of the deceased reporter, and where adequate and effective appellate review of the denial of the motion for new trial is possible only upon a complete transcript of the hearing on the motion.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

United States Constitution.

Amendment V:

No person shall * * * be deprived of life, liberty or property without due process of law; * * *

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

Amendment XIV, Section 1:

* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 28, Section 753(b):

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

STATEMENT.

On November 15, 1963, at the conclusion of a seven-day non-jury trial, petitioner was convicted in the United States District Court for the Northern District of Ohio, Eastern Division, on charges of conspiring to violate, and of aiding and abetting another in violating, 18 U.S.C. § 657. (Misapplication of Funds of Small Business Investment Company) (184a-195a).* After conviction and before sentence, petitioner filed a motion for new trial on the basis of newly-discovered evidence. (275a-277a). The trial court declined to rule upon the motion before imposing sentence, thereby compelling petitioner to initiate an appeal from his conviction while the motion for new trial was still pending. (197a). On December 8, 1965, the Sixth Circuit Court of Appeals, for the purpose of permitting resolution of the motion for new trial, ordered that petitioner's appeal be held in abeyance until the trial judge certified how he would rule upon the motion if the case were remanded for a ruling. (198a). Pursuant to that order, the trial court held a hearing on April 1, 1966.

The only record of what transpired at the April 1st hearing is found in the memorandum opinion of the trial judge. (277a-279a). The court's opinion remains as the only record of the hearing due to the fact that the court reporter who recorded the hearing died only two days after the memorandum opinion was filed. (292a). At the

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* Transcript references to pages 1a to 196a will be found in Appellant's Appendix filed in Case No. 16,080, United States v. Luxenberg, a companion case to Case No. 16,964, United States v. Zimmerman. Pages 197a to 279a will be found in the Appellant's Supplemental Appendix in Case No. 16,964. Pages 281a to 298a will be found in the Appellant's Appendix in Case No. 18,537, United States v. Zimmerman. All appendices are part of transcript of the record in the court below.

time of the reporter's death, his shorthand recording of the hearing had not been transcribed. Despite diligent effort by appellate counsel, the reporter's notes never have been and probably never will be deciphered. The reporter employed a style no longer in use and no longer decipherable by any available expert. (288a-289a).

The memorandum opinion of the court and the affidavits filed in support of the motion for new trial demonstrate that substantial evidence was offered in support of the motion. An affidavit, offered into evidence at the time of the hearing because the affiant was then deceased, contained the sworn statement of an attorney who had previously represented one of petitioner's co-defendants. (275a-277a). The co-defendant, Mervin Gold, was deceased at the time of trial. The attorney's affidavit indicated that Gold admitted engineering the entire transaction which ultimately led to petitioner's conviction, and added that petitioner had been an innocent and unwitting participant in the entire scheme. A second witness, also an attorney who had represented Mervin Gold in unrelated matters, testified that Gold had assured him that petitioner was innocent of any wrongdoing in the transaction which led to petitioner's indictment and conviction. Gold had bragged to the second witness about the manner in which he had exploited petitioner. A third witness was called in support of the motion for new trial. (278a). Also an attorney, the third witness had defended Mervin Gold against the indictment in which petitioner was named as co-defendant. By affidavit, trial counsel had stated that he did not know precisely what information the attorney might have. At the hearing on the motion for new trial, the attorney asserted that he possessed information which would exonerate petitioner and which he would reveal only upon court order. (277a-279a). The

precise nature of this witness's testimony and the circumstances surrounding its exclusion do not appear in the court's memorandum opinion.

On April 22, 1966, the trial judge certified to the Circuit Court that, if the case were remanded for ruling, the motion for new trial on the basis of newly-discovered evidence would be denied. (279a). Thereafter, appellate counsel filed a brief in petitioner's behalf in the Sixth Circuit Court of Appeals. Among other contentions, it was urged that the trial court had erred in failing to grant a new trial. (Brief for Appellant, United States v. Zimmerman, Case No. 16,964, p. 32). The claim of error rested upon the assertion that the evidence presented in support of the motion required that a new trial be granted. The Circuit Court was without access to a stenographic record of the evidence which had been presented at the hearing on the motion. (286a). In apparent recognition of that fact, appellate counsel described the circumstances which had resulted in the presentation of an argument on an incomplete record:

> "Due to the death of the court reporter who took the testimony at the hearing incident to appellant's motion for new trial, appellant is unable to provide a transcript of the testimony concerning said hearing. Such testimony will be made available to the court as soon as a transcription of the original shorthand notes can be obtained by counsel. The federal court reporter is attempting to locate some persons who can effect such transcription in this matter and in various other matters." (Brief for Appellant, United States v. Zimmerman, Case No. 16964, in the United States Court of Appeals for the Sixth Circuit, p. 33).

Unfortunately, the tentatively promised record was never produced. (288a-289a). The Circuit Court affirmed petitioner's conviction and the denial of his motion for new

trial by order entered on March 13, 1967. (See Opinion, Appendix, *infra,* p. 20).

On July 17, 1967, petitioner filed a motion requesting the trial court to vacate the denial of his motion for new trial and to rehear the motion for new trial. (285a-287a) His motion was grounded on the assertion that he had been unable to obtain full and effective appellate review of the original ruling on the motion for new trial. Petitioner asserted that review of the denial of the motion was rendered defective in the following respects: (1) The absence of a complete record of the hearing precluded adequate review of the question of whether the evidence presented in support of the motion was sufficient to require that a new trial be granted; and (2) There was no record of the hearing which permitted review of a fundamental vigorously contested evidentiary question which arose at the hearing—the question of whether or not the trial court erred in precluding a key witness from offering testimony on a critical issue in the case on the ground that that witness had obtained his information in the context of an attorney-client relationship (286a-287a).

Petitioner requested the trial court to grant a new hearing on the motion for new trial for the purpose of permitting a record to be made from which an appeal could be taken. His motion was denied by the district court on January 22, 1968 on the ground that the court was without jurisdiction to reconsider its earlier decision since that decision had become final. (Appendix, *infra,* p. 35.) The decision of the district court was affirmed by the Circuit Court on January 8, 1969. (Appendix, *infra,* p. 43).

REASONS FOR GRANTING THE WRIT.

I. Whether Petitioner Waived or Forfeited the Right to Adequate and Effective Appellate Review Poses an Important Question of Federal Law.

Petitioner was tried without a jury and convicted on the basis of evidence deemed adequate to support, though not to compel, a verdict of guilty.[1] Before sentence was imposed, newly-discovered evidence which directly contradicted the finding of guilt was offered at a hearing in support of a motion for new trial. The evidence consisted of an attorney's statement that he had received information, specifically described by the attorney, which tended to prove that petitioner was totally innocent of any wrongdoing in the transaction which led to his indictment. Similar testimony was offered by a second attorney. A third witness, also an attorney, purported to have further evidence of petitioner's innocence. He was barred from presenting that evidence on the ground that it had been acquired in the context of an attorney-client relationship.

This brief summary of the hearing on the motion for new trial demonstrates that there were substantial questions raised by the denial of that motion. It is perfectly clear that petitioner and his appellate counsel wished to have the denial of the motion reviewed on appeal. It is equally clear that petitioner was denied the opportunity to secure adequate and effective appellate review of the denial of the motion for new trial. He lost that opportunity by reason of a combination of misfortune and inadvertence. The misfortune was the death of the court reporter who recorded the hearing on the motion for new trial. The inadvertence was the failure to file an immediate request

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[1] *United States v. Zimmerman*, reported *sub nom United States v. Luxenberg*, 374 F. 2d 241, 249 (6th Cir. 1967).

for a second hearing when it became apparent that the reporter's death rendered a transcript of the hearing unavailable. Whether either or both of these circumstances should bar petitioner from exercising an effective appeal from the denial of his motion for new trial is a question which can only be resolved by defining the standard of waiver applicable to the right of appeal.

This Court has repeatedly held that a defendant may not arbitrarily be denied the opportunity to seek appellate review of a criminal conviction. E.g., *Burns v. Ohio,* 360 U. S. 252 (1959). That the right to seek appellate review is an empty right unless accompanied by the opportunity to present a complete record of the trial proceedings to the reviewing court is a proposition which this Court has also recognized. E.g., *Griffin v. Illinois,* 351 U. S. 12 (1956); *Lane v. Brown,* 372 U. S. 477 (1963). The question this Court has not determined is the manner in which the right to seek adequate and effective appellate review of a criminal conviction may be waived.

While most of this Court's decisions on questions involving loss of the right to an adequate and effective appeal have involved indigents represented by appointed counsel, those decisions establish principles relevant to the instant case. For example, in *Enstminger v. Iowa,* 386 U. S. 748 (1967), the Court refused to permit an indigent appellant to be denied plenary review of his conviction by reason of appointed counsel's failure to file a complete record on appeal. Review on a truncated record was deemed to be constitutionally inadequate:

> "Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure as embodied in Iowa law. Such procedure automatically deprived

> him of a full record, briefs, and arguments on the bare election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record in the case. By such action 'all hope of any [adequate and effective] appeal at all', *Lane v. Brown*, 372 U. S. 477, was taken from the petitioner." [2]

Here, as in *Enstminger*, petitioner sought, through counsel, to perfect a plenary appeal from the denial of the motion for new trial on the basis of newly-discovered evidence. Unlike counsel for Enstminger, petitioner's counsel did not choose to present an incomplete transcript to the appellate court. His uncontroverted affidavit establishes that he did everything in his power to present a transcript of the hearing on the motion for new trial to the court below. His failure to do so was not even a "bare choice." It was a product of a combination of circumstances which rendered the record of the hearing unavailable.

Whether a double standard of waiver of the right to full and effective appellate review is to be applied is the issue presented by these facts. If non-indigent appellants are to enjoy the same protection against unintentional and unavoidable loss of the right to effective appeal as is enjoyed by indigent appellants, the courts below have acted erroneously by denying petitioner an opportunity to perfect an effective appeal.

While this Court has dealt extensively with the problem of protecting the right to adequate and effective appellate review,[3] the question of how that right may be forfeited or waived remains a serious question. For example,

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[2] *Enstminger v. Iowa*, 386 U. S. 748, 752 (1967).

[3] E.g., *Douglas v. California*, 372 U. S. 353 (1963); *Smith v. Bennett*, 365 U. S. 708 (1961).

in *United States v. Robinson*, 361 U. S. 220 (1960), a convicted defendant was subjected to absolute forfeiture of the right to appeal by reason of his attorney's inadvertent failure to file a timely notice of appeal. In other cases, not involving the right to appellate review, innocent litigants have also been allowed to suffer the loss of substantial rights as a result of delinquency for which the litigants themselves were wholly blameless. E.g., *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). It would seem that these cases present a fundamental inconsistency deserving of resolution by this Court.

II. The Decision Below, Operating to Bar Petitioner from Adequate and Effective Appellate Review of a Substantial Constitutional Claim, Is in Conflict With Decisions of This Court Defining the Standard Applicable in Determining Waiver of Constitutional Claims.

No record of the hearing on the motion for new trial on the basis of newly-discovered evidence was available to the Circuit Court when it ruled upon the propriety of the trial court's denial of that motion. Only the trial court's opinion reflected anything at all regarding what had occurred at the hearing. The opinion did not reflect that a principal issue in the hearing was whether or not an attorney, called by petitioner as a witness, should be permitted to testify regarding information he had acquired from a client who, before his death, was a co-defendant in the case in which petitioner was charged. Because that issue was not apparent on the record before the Circuit Court, that Court could not review the claim that the exclusion of the attorney's testimony operated to deprive petitioner of the right to have compulsory process to obtain witnesses in his own behalf.

The critical importance of the right to compulsory process, granted by the Sixth Amendment, is hardly a matter for dispute. Without that right, the accused would be virtually powerless to present his position on the factual questions in issue. This court recently defined the objective of the constitutional guarantee of compulsory process in unambiguous terms:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where truth lies." [4]

If, as this Court has repeatedly insisted, "The basic purpose of a trial is the determination of truth," [5] effective implementation of the defendant's right to present all material evidence relevant to the disposition of the charges against him is absolutely essential. The record in the instant case does not permit the determination of whether exclusion of the attorney's testimony in the hearing on the motion for new trial operated to violate petitioner's right to have compulsory process. Whether it was appropriate to exclude that testimony on the ground that it was privileged can only be decided by examination of the circumstances in which the information was acquired, the factors relevant to its disclosure, the importance of maintaining the confidentiality of the information, and the manner in which the privilege was asserted at hearing.[6]

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[4] *Washington v. Texas,* 388 U. S. 14, 17 (1967).

[5] *Tehan v. Shott,* 382 U. S. 406, 416 (1966).

[6] See, e.g., *Baird v. Koerner,* 279 F. 2d 623 (9th Cir. 1960); *United States v. McDonald,* 313 F. 2d 832 (2nd Cir. 1963); *United States v. Wiggins,* 184 F. Supp. 673 (D.D.C. 1960); *In Re Richardson,* 31 N. J. 391, 157 A. 2d 695 (1960).

Because a record of the hearing is not available, petitioner was precluded from seeking appellate review of the constitutional claim that he was denied the right of compulsory process. He did not knowingly and intentionally waive the right to review of that claim. If permitted to stand, the decision below would "defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." [7] This Court has scrupulously guarded against any practices which impose a forfeiture of a substantial federal claim absent an intentional waiver of that claim. The standard of waiver applicable to abandonment of constitutional claims has been defined in a statement which is now classic:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Petitioner did not intentionally relinquish or abandon the right to appellate review of his claim of denial of the right to compulsory process. Nor did his attorney do so. If his attorney had engaged in conduct in derogation of petitioner's demands, petitioner could not properly be charged with waiver. See *Brookhart v. Janis*, 384 U.S. 1 (1966).

By barring petitioner from seeking effective appellate review of a substantial constitutional claim, the court below has acted in disregard of the principles announced by this Court in *Fay v. Noia, infra,* in *Sanders v. United States*, 373 U.S. 1 (1963) and in *Johnson v. Zerbst, supra.* Those principles demand that petitioner be afforded the right to present his claim with full opportunity to demonstrate the basis for its validity.

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[7] *Fay v. Noia*, 372 U. S. 391, 424 (1963).

III. Denial of a Second Hearing on a Motion for New Trial on the Basis of Newly-Discovered Evidence, Where the Transcript of the First Hearing Was Rendered Unavailable by the Death of a Court Reporter, Constitutes a Substantial and Unwarranted Departure From Established Procedures.

Through no fault of petitioner the record of the hearing on his motion for new trial on the basis of newly-discovered evidence became unavailable. It became unavailable because of the death of the court reporter who recorded the hearing and who employed shorthand techniques which proved to be undecipherable by any other reporter. In the courts below, petitioner sought nothing more than a second hearing on the motion for new trial—a hearing which would permit a record to be made from which an appeal could be taken. Petitioner's request was founded on established procedures employed to deal with the disappearance of the record of any portion of a criminal proceeding.

The requirement that all proceedings in a criminal case be stenographically recorded is contained in 28 U.S.C. § 753(b). Where, despite compliance with the statutory command, a record becomes unavailable in a criminal case, the established practice for correcting the situation is to grant a new hearing.[8]

By denying petitioner the opportunity to obtain a record of the hearing on the denial of the motion for new trial on the basis of newly-discovered evidence, in the only manner in which such record could be obtained, the courts below disregard established and well-accepted procedures.

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[8] See e.g. *Herring v. Kennedy-Herring Hardware Co.*, 261 F. 2d 202 (6th Cir. 1958); *Stephens v. United States*, 289 F. 2d 308 (5th Cir. 1961); *Brown v. United States*, 314 F. 2d 293 (9th Cir. 1963).

CONCLUSION.

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
NIKI Z. SCHWARTZ,
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APPENDIX.

MEMORANDUM OPINION OF DISTRICT COURT DENYING MOTION FOR NEW TRIAL.

(Filed April 22, 1966.)

BATTISTI, *J.*:

On November 15, 1963, after a trial by the Court without a jury, the Court found defendants George Zimmerman and Leonard Luxenberg guilty of the offenses charged in Counts 4 and 5 of the Indictment in criminal action CR 62-223. Separate appeals of Mr. Zimmerman and Mr. Luxenberg are now pending in the Sixth Circuit Court of Appeals.

Both Mr. Zimmerman and Mr. Luxenberg have moved, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial on the ground of newly discovered evidence. The Sixth Circuit Court of Appeals has requested that this Court certify whether it will grant or deny the motions for a new trial if the case is remanded for a ruling on the same.

On April 1, 1966, the Court held an oral hearing on the motions in question. At this hearing, the defendants called two witnesses.

The first witness, Attorney James R. Willis, formerly represented co-defendant Mervin L. Gold, now deceased, in criminal action CR 62-223. Mr. Willis testified that, pursuant to a request made by Mr. Gold, he contacted the United States Attorney and proposed a "deal" whereby various criminal cases pending against Mr. Gold could be resolved. According to Mr. Willis, he was authorized to propose to the United States Attorney that Mr. Gold would enter a plea of guilty to certain charges then pending if an arrangement could be worked out whereby a previous sentence of eight years could be reduced and Mr. Gold be given the right to select the penitentiary to which he

would be sent. Mr. Willis further testified that Mr. Gold authorized him to state to the United States Attorney that he would give a statement exonerating the other parties who had been indicted along with himself. Mr. Gold's proposal was flatly refused by the United States Attorney.

The second witness, Attorney A. H. Zychick, was, for a period of time, associated with Attorney Fred W. Garmone in the defense of Mr. Mervin Gold in another criminal case in this Court. Mr. Zychick testified that following the termination of his and Mr. Garmone's employment as counsel for Mr. Gold, Mr. Gold would often drop into his office to use the phone and visit with either himself or Mr. Garmone. Mr. Zychick testified that on some of these occasions Mr. Gold made statements concerning Mr. Zimmerman and Mr. Luxenberg. According to Mr. Zychick, Mr. Gold made derogatory comments with regard to Messrs. Zimmerman and Luxenberg and boasted that he had made dupes out of them.

In support of their motions for a new trial, the defendants have also presented the Court with an affidavit of Attorney Fred W. Garmone. In his affidavit Mr. Garmone, now deceased, stated that following the termination of his employment as counsel for Mr. Gold, Mr. Gold voluntarily disclosed certain information. According to Mr. Garmone, Mr. Gold indicated to him that Mr. Zimmerman's participation in the transactions that gave rise to the Indictment in this case was of a limited nature; and, further, that the "other persons" involved were dupes.

One of the essential requisites for a new trial based in newly discovered evidence is that the "newly discovered" evidence is of such nature that it would probably produce an acquittal in the event of retrial. 8 *Moore's Federal Practice,* Paragraph 33.03 (1). Even if

it be assumed that the other essential requisites for the granting of a new trial based on newly discovered evidence have been established,[1] this Court is of the opinion that the evidence offered is not of such a nature that it would probably produce an acquittal in the event of retrial. Viewing the evidence offered in support of the motion for a new trial in conjunction with all of the evidence elicited at the trial, the Court finds that the alleged statements attributed to Mr. Gold to the effect that Mr. Zimmerman and Mr. Luxenberg were dupes is not worthy of credence. While Mr. Gold's role in the unlawful activities might have been more substantial than that of either Mr. Zimmerman or Mr. Luxenberg, the Court finds nonetheless that the Government has established, beyond a reasonable doubt, that the Messrs. Luxenberg and Zimmerman did unlawfully, wilfully, and knowingly combine, conspire, and agree to defraud the Cosmopolitan Small Business Investment Company as charged in Count 4 of the Indictment; and, further, that George Zimmerman and Leonard Luxenberg did aid and abet the commission of the criminal offense set forth in Count 5 of the Indictment.

The Court finds that the "newly discovered" evidence would not, upon a retrial, produce an acquittal either of Mr. Zimmerman or Mr. Luxenberg. The Court, therefore, finds and certifies that it would deny the motions for a new trial in the event that the case was remanded for a ruling upon the same.

The Clerk is ordered to supply the Sixth Circuit Court of Appeals with a copy of this Memorandum Opinion.

FRANK J. BATTISTI,
United States District Judge.

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[1] The other essential elements are: (1) that the evidence must have been discovered since the trial, and (2) that the evidence is material to the issues at trial.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING CONVICTION AND DENIAL OF MOTION FOR NEW TRIAL.

(February 17, 1967.)

Before O'Sullivan and Edwards, Circuit Judges, and Cecil, Senior Circuit Judge.

CECIL, Senior Circuit Judge.

Leonard Luxenberg and George Zimmerman, the defendants-appellants, hereinafter referred to by name or as defendants, were convicted in the United States District Court for the Northern District of Ohio on the fourth and fifth counts of an indictment. One Mervin L. Gold was indicted in the first three counts of the same indictment, and was tried before a jury and found guilty on all three counts. All five counts involved a fraud on Cosmopolitan Small Business, Inc. hereinafter called Cosmopolitan, a licensee of the Small Business Administration, referred to herein as the Administration, an agency of the United States.

The defendants Luxenberg and Zimmerman was granted a severance and were tried separately from Gold. They waived a jury and were tried to the court on the fourth and fifth counts of the indictment. The fourth count of the indictment charged that the defendants conspired with Gold, with Feature Products of Indianapolis, with Feature Products of Cleveland, and with each other, to misapply and defraud Cosmopolitan of $28,000, which sum belonged to and was entrusted to the care of Cosmopolitan by the Administration, an agency of the United States, in violation of Sections 371[1] and 657[2], Title 18, U.S.C. The

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[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States,

(Continued on following page)

fifth count charged that the defendants aided and abetted[3] Gold in the fraud and in the misapplication of the $28,000 fund, as alleged in the fourth count of the indictment.

The pertinent facts as alleged may be stated as follows: Luxenberg was the sole stockholder of two corporations, Feature Products of Indianapolis and Feature Products of Cleveland. Zimmerman was the secretary and attorney for both these corporations. The Administration is an agency of the United States whose principal purpose is to license small business investment companies with authority to make loans and invest in small business concerns. Cosmopolitan, an Ohio corporation, applied to the Administration for a license. Gold was the undisclosed organizer and manager of Cosmopolitan and the applicant for this license. Upon request of Gold, Zimmerman did the legal work in incorporating Cosmopolitan and in making its application for the license. The name of Gold did not appear in any capacity in any of the documents submitted to the Administration. It was represented in these documents that Cosmopolitan had on deposit in its account

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(Continued from preceding page)

or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] "Whoever, being an officer, agent or employee of or connected in any capacity with * * * any small business investment company, * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; * * *"

[3] Section 2(a), Title 18, U.S.C.

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

at The Continental Bank of Cleveland the sum of $155,000. This was a false statement. Zimmerman requested the Administration to transmit to Cosmopolitan the license and matching funds of $150,000. The address of Zimmerman and Cosmopolitan was the same suite of the Engineers' Building in Cleveland. The Administration granted the license and issued a United States Treasurer's check to Cosmopolitan for $150,000. This is the only sum ever credited to the account of Cosmopolitan at the Continental Bank of Cleveland, which account was under the control of Gold.

After Gold obtained control of this money, he instructed Zimmerman to act as escrow agent in the handling of a $28,000 and a $32,000 loan to Feature Products of Indianapolis. Zimmerman had his associate, Eugene Stevens, prepare escrow papers for the execution of the loan. Gold delivered to Zimmerman Cosmopolitan's checks for $28,000 and $32,000 payable to Eugene Stevens. These checks were deposited at the Society National Bank in the escrow account of Zimmerman and Stevens. Among the escrow papers were the following:

1. A promissory note for $39,200, dated March 23, 1961, from Feature Products of Indianapolis to Cosmopolitan. This note bore the signature of Leonard Luxenberg as president.

2. A promissory note for $44,800, dated March 29, 1961, payable to Cosmopolitan by Feature Products of Indianapolis. This note also bore the signature of Leonard Luxenberg as president.

3. An unsigned and unexecuted resolution of Cosmopolitan's Board of Directors, dated March 23, 1961, authorizing the loan of $28,000 to Feature Products of Indianapolis.

4. An unsigned and unexecuted resolution of Cosmopolitan's Board of Directors, dated March 29, 1961, authorizing the loan of $32,000 to Feature Products of Indianapolis.

On March 27, 1961, Zimmerman's check for $28,000 was issued to Feature Products of Indianapolis. This check was charged to the escrow account of Zimmerman and Stevens at the Society National Bank. At the request of Gold the $32,000 was withdrawn from the escrow proceedings. The $28,000 check was credited to the account and credit of Feature Products of Indianapolis, in the Indiana National Bank of Indianapolis, on March 29, 1961. On March 29, 1961, Feature Products of Indianapolis issued its check for $27,000, drawn on the Indiana National Bank, payable to Feature Products of Cleveland. Zimmerman, as secretary of Feature Products of Cleveland, caused a certified resolution, dated March 29, 1961, to be filed with the National City Bank of Cleveland, authorizing the opening and maintenance of an account in the name of Feature Products of Cleveland, and permitting withdrawal of funds from the account by Len Luxenberg, president, and M. A. Singer, manager. Under date of April 4, 1961, Feature Products of Cleveland issued two checks totaling $26,000, payable to Mervin L. Gold and signed by Len Luxenberg. These two checks were deposited and credited to Gold's personal account at the Continental Bank at Cleveland. The remaining $2000 was never disbursed to either Gold or Cosmopolitan. The alleged loan of $28,000 to Feature Products of Indianapolis, for which Luxenberg, as president, executed a promissory note, was never paid to Cosmopolitan.

[1-4] Both defendants assign as error the trial judge's denial of their motion to dismiss the indictment on the ground that it was based on their testimony before the

grand jury in violation of their privilege against self-incrimination. The fifth amendment's privilege against self-incrimination in criminal cases[4] is applicable in proceedings before a grand jury. *United States v. Monia*, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed 376; *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110. The extent to which one must be advised of this right depends upon whether one is a defendant in custody of the authorities or whether one is merely a witness. One who is a defendant must be advised that he may refuse to answer incriminating questions and that anything he says may be used against him. A person testifying before a grand jury as a witness need not be so advised, but does retain the right to decline to give an incriminating answer. *Stanley v. United States*, 245 F.2d 427 (C.A.6); *United States v. Benjamin*, 120 F.2d 521 (C.A.2); *Mulloney v. United States*, 79 F.2d 566 (C.A.1), cert. den. 296 U.S. 658, 56 S. Ct. 383, 80 L.Ed. 468. This Court has held that a person who is virtually in the position of a defendant must be accorded the same rights as a defendant. *Stanley v. United States, supra.* Consequently a person against whom the prosecuting attorney is not seeking an indictment need not be advised of his right to refuse to answer incriminating questions. *United States v. Parker*, 244 F.2d 943 (C.A.7), cert. den. 355 U.S. 836, 78 S.Ct. 61, 2 L.Ed.2d 48. The fact that a person appeared in the capacity of a witness and testified before a grand jury without being so advised, does not furnish a basis for dismissing an indictment subsequently returned against such individual based, in part, upon his testimony. *United States v. Scully*, 225 F.2d 113 (C.A.2), cert. den. 350 U.S. 897, 76 S.Ct. 156, 100 L.Ed. 788. It

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[4] "No person * * * shall be compelled in any criminal Case to be a witness against himself, * * *"

is the duty and right of such witness to invoke the privilege against self-incrimination and refuse to answer questions.

[5] The stipulated facts in this case demonstrates that this assignment of error is without merit. Zimmerman and Luxenberg testified before a grand jury investigating the business operations of Mervin Gold. Neither was advised of his right to refuse to answer incriminating questions. On the basis of this and other testimony, the grand jury returned indictments against both defendants. The crucial fact stipulated by the parties was that no "criminal proceedings were pending, or threatened against either of them; * * * nor * * * (was) the United States * * * then seeking an indictment against either of them."

By their own stipulations Zimmerman and Luxenberg testified as witnesses, not as defendants or persons in the position of defendants, before the grand jury. The fact that they made statements from which the grand jury could return an indictment, does not change the fact that their appearances before the grand jury were in the capacity of witnesses. While so testifying they had the right to invoke the privilege against self-incrimination, and their failure to do so, in view of the facts of this case, cannot be grounds to dismiss the indictment.

[6] Both defendants claim that the trial judge committed reversible error in refusing to permit them to inspect the minutes of the grand jury which returned the indictment against them. The substance of their argument is that without these minutes the defense was hampered in presenting evidence to show that the defendants were virtually in the positions of defendants at the time they were subpoenaed before the grand jury. An examination of the record indicates that no request was made for inspection of the minutes for the purpose claimed in the

briefs of appellants. The only reference in the present record to the grand jury minutes is a colloquy[5] between the court and counsel in connection with the direct-examination of George Zimmerman on the motion to dismiss the indictment.

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[5] "Mr. McMonagle: Your Honor, in order to follow through in some orderly manner as to the evidence to be now adduced, I would like to request the District Attorney to hand to me the Minutes of the Grand Jury proceedings pertaining particularly now to this witness, just for the purpose of handling the matter in an orderly manner.

"The Court: What do you propose to go into?

"Mr. McMonagle: With reference to the admonition to the witness, that he was a witness before the Grand Jury, and also as to the purpose for which he was called before the Grand Jury.

"Mr. Cimino: Your Honor, that has already been stipulated and, of course, we violently object to the handing over of Grand Jury minutes to counsel for the defendants. The statements therein and the proceedings are secret.

"The Court: I see no reason to give you the minutes of the Grand Jury at this time. It has been stipulated that they were not advised of their rights.

"Mr. Fink: Your Honor, might we then suggest that the minutes might be made available to the Court?

"The Court: They have been made available to me, and I thought that was agreed upon before recess in chambers, and I have read them.

"Mr. Fink: Oh, they have been? We didn't know that.

"The Court: I have read the testimony of Zimmerman and Luxenberg. I certainly would not except that certainly I understood it was stated to me very clearly in chambers that neither of you had any objection to my reading them.

"Mr. Fink: No, we don't, your Honor.

"Mr. McMonagle: We said that.

"Mr. Fink: We were hoping they would give them to you now.

"The Court: I thought that was satisfactory that it be done.

"Mr. McMonagle: Well, your Honor, let me then incorporate those minutes in this proceeding, so you have the testimony as to what we are going to submit—

"The Court: Just a moment. The stipulation shows these gentlemen were called to testify before the Grand Jury as witnesses; they were subpoenaed; that as a result of their testimony, at least partly as a result of their testimony, they were indicted. I feel that in view of the stipulation there isn't a great deal more to show, but in the event you have something more you want to show, all right."

The Supreme Court, in *Dennis v. United States*, 384 U.S. 855, 869, 86 S.Ct. 1840, 16 L.Ed.2d 973, while recognizing " 'the long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts' " reaffirmed the holding of *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.Ed.2d 1323, rehearing den. 361 U.S. 855, 80 S.Ct. 42, 4 L.Ed.2d 94, that upon demonstration of a "particularized need" a trial judge may permit the production and examination of the grand jury's minutes. The "particularized need" present in both the *Dennis* and *Pittsburgh Plate Glass Co.* cases was the possible impeachment of witnesses upon cross-examination at the trial. In the present case the attorney for Zimmerman requested production of the minutes to substantiate facts which were already stipulated. The trial judge, in the absence of a showing of a valid need for their production, properly refused to permit the defense to examine them.

[7, 8] Defendant Luxenberg's contention that he was denied due process of law because an indictment was returned against him without first granting him a preliminary examination as required by Rule 5 of the F.R.Cr.P.[6]

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[6] "(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. * * *

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

is without merit. This Court has repeatedly held that there is no denial of due process where a person is indicted by the Grand Jury without having a preliminary examination. There is no constitutional requirement for such an examination. *United States v. Smith,* 343 F.2d 847, cert. den. 382 U.S. 824, 86 S.Ct. 55, 15 L. Ed.2d 69; *Dillard v. Bomar,* 342 F.2d 789, cert. den. 382 U.S. 883, 86 S.Ct. 176, 15 L.Ed.2d 123; *United States v. Shields,* 291 F.2d 798, cert. den. 368 U.S. 933, 82 S.Ct. 371, 7 L.Ed.2d 196, rehearing den. 368 U.S. 962, 82 S.Ct. 401, 7 L.Ed.2d 393; *Boone v. United States,* 280 F.2d 911 (C.A.6). See also, *United States ex rel. Kassin v. Mulligan,* 295 U.S. 396, 55 S.Ct. 781, 79 L.Ed. 1501; *Goldsby v. United States,* 160 U.S. 70, 16 S.Ct. 216, 40 L.Ed. 343.

[9, 10] Defendant Luxenberg assigns as error the failure of the trial judge to grant his motion for a directed verdict at the close of the government's case and defendant Zimmerman assigns as error the failure of the trial judge to grant his motion for acquittal at the close of all the evidence. Zimmerman also claims that the trial judge erred in entering findings of guilty on the "aiding and abetting" and conspiracy counts of the indictment. These assignments of error all relate to the sufficiency of the evidence. In reviewing the findings and conclusions of a trial judge, in his role of finder of facts, an appellate court cannot enter into a de novo consideration of the evidence. The findings of the lower court will not be reversed if there is substantial and competent evidence to support them. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, rehearing den. 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222; *United States v. Knight,* 336 U.S. 505, 69 S.Ct. 704, 93 L.Ed. 845; *United States v. Decker,* 304 F.2d 702 (C.A.6). The question before us is whether there is substantial and competent evidence to support the trial judge's

conclusion. In considering the sufficiency of the evidence, we do not determine whether it establishes guilt beyond a reasonable doubt but only that the evidence would permit the trier of facts to find the defendants guilty beyond a reasonable doubt. *Ramsey v. United States*, 248 F.2d 740 (C.A.6); *United States v. Ragland*, 306 F.2d 732 (C.A.4), cert. den. 371 U.S. 949, 83 S.Ct. 504, 9 L.Ed. 2d 498.

[11-13] In considering motions for directed verdicts and motions for acquittal, an appellate court must construe the evidence most favorably to the government. *Glasser v. United States, supra; United States v. Conti*, 339 F.2d 10 (C.A.6). This includes the drawing of all reasonable inferences favorable to the government. *United States v. Decker, supra; Battjes v. United States*, 172 F.2d 1 (C.A.6). The fact that the evidence would support alternative inferences is not significant. On appeal, this Court is limited to determining whether the trial court was justified in making the inferences it did. *United States v. Conti, supra.* Neither does a reviewing court pass upon the credibility of witnesses nor the weight of the evidence. *Glasser v. United States, supra; United States v. Carter*, 311 F.2d 934 (C.A.6), cert. den., 373 U.S. 915, 83 S.Ct. 1301, 10 L.Ed.2d 415, rehearing den. 373 U.S. 954, 83 S.Ct. 1677, 10 L.Ed.2d 708.

[14] The findings and conclusions of the trial judge are based largely upon circumstantial evidence. This Court has repeatedly held that circumstantial evidence may be sufficient to sustain a verdict of guilty, and such circumstantial evidence need not be of such a character as to remove every reasonable conclusion except that of guilt. *United States v. Conti, supra; United States v. Young*, 291 F.2d 389 (C.A.6); *United States v. Comer*, 288 F.2d 174, cert. den., 366 U.S. 925, 81 S.Ct. 1351, 6 L.Ed.2d 384. See also, *Holland v. United States*, 348 U.S.

121, 75 S.Ct. 127, 99 L.Ed. 150, rehearing den., 348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731.

[15-18] Defendant Zimmerman argues that in order to be found guilty of aiding and abetting and of participating in a conspiracy there must be proof of specific intent to commit the substantive crime. In support of this proposition the appellant cites a number of tax evasion cases and attempts to draw an analogy therefrom. However, a review of the cases under 18 U.S.C. § 657 and 18 U.S.C. § 656,[7] an almost identical section dealing with an almost identical offense, indicates that such reliance is misplaced. All that is required under these sections is the "intent to injure or defraud." *United States v. Hickey,* 360 F.2d 127 (C.A.7); *United States v. Weaver,* 360 F.2d 903 (C.A.7), cert. den. 385 U.S. 825, 87 S.Ct. 57, 17 L.Ed.2d 61; *Logsdon v. United States,* 253 F.2d 12 (C.A.6); *Golden v. United States,* 318 F.2d 357 (C.A.1); *Seals v. United States,* 221 F.2d 243 (C.A.8). Where a criminal intent is one of the elements of an offense, its existence is a question of fact to be determined by the trier of facts. *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288. The intent to injure or defraud may be proven by circumstantial evidence, which is often the only evidence available.

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[7] "Whoever, being an officer, director, agent or employee of or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Logsdon v. United States, supra. The trier of facts is permitted to consider all the surrounding circumstances in making this determination. *Morissette v. United States, supra.* A reckless disregard of the interests of Cosmopolitan is sufficient evidence to warrant a finding of an intent to injure or defraud. *Logsdon v. United States, supra.*

[19] Another element necessary to sustain an aiding and abetting conviction is proof that the defendant " 'in some sort associated himself with the venture, that he participate in it as in something that he wishes to bring about, that he (sought) by his action to make it succeed.' " *Nye & Nissen v. United States,* 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919.

[20-24] Appellant Zimmerman further argues that his conviction on the conspiracy count cannot be upheld because there was no proof of his knowledge of the criminal plan in which he is said to have participated and no proof of his agreement to participate in any such scheme. Knowledge, like intent, is a factual issue which may be proved by circumstantial evidence. Whether a conspiracy exists is likewise a factual question to be determined by the judge as trier of facts in a trial without a jury. It is not fatal to the prosecution's case that it does not prove that the defendants knew or participated in every phase of the unlawful scheme. *Blumenthal v. United States,* 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154, rehearing den. 332 U.S. 856, 68 S.Ct. 385, 92 L.Ed. 425; *United States v. Dardi,* 330 F.2d 316 (C.A.2), cert. den. 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50, *Gravis v. United States,* 379 U.S. 869, 85 S.Ct. 117, 13 L.Ed.2d 73, *Berman v. Fay,* 381 U.S. 955, 85 S.Ct. 1808, 14 L.Ed.2d 727, rehearing den., *Rosenthal v. United States,* 379 U.S. 986, 85 S.Ct. 640, 13 L.Ed.2d 579. It is only necessary that a defendant

know of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance. *United States v. Hickey, supra; United States v. Dardi, supra.* Participation in a conspiracy need not be proved by direct evidence. "(A) common purpose and plan may be inferred from a 'development and collocation of circumstances.'" *Glasser v. United States, supra,* at p. 80, 62 S.Ct. p. 469; *Poliafico v. United States,* 237 F.2d 97 (C.A. 6), cert. den. 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed.2d 597, rehearing den. 353 U.S. 931, 77 S.Ct. 718, 1 L.Ed.2d 725. It is not necessary that there be a formal agreement in order to have an unlawful conspiracy. *American Tobacco Co. v. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575. "Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose." *American Tobacco Co. v. United States,* 147 F.2d 93, 107, (C.A.6), affirmed 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575. See also *Poliafico v. United States, supra.*

The evidence shows that Zimmerman drew up the necessary papers to incorporate Cosmopolitan, and did not, when applying to the Administration for the loan of $150,000, include the name of Mervin Gold as an organizer and as a person authorized to approve loans on behalf of Cosmopolitan. The evidence further shows that Zimmerman knew that Gold was the organizing force behind the corporation. Zimmerman was responsible for drawing up the loan papers and for making the escrow arrangements. Zimmerman permitted Gold to effectuate the loan, knowing that the corporate minutes approving the loan, which he had drawn, were not executed according to law. Zimmerman knew that the loan was made without adequate security for the protection of his client, Cosmopolitan.

Luxenberg executed the notes evidencing the loan from Cosmopolitan to Feature Products of Indianapolis. At the time such notes were executed Luxenberg knew that the Indianapolis business was closing its doors. To repay the loan, Luxenberg caused three checks to be issued to the order of Mervin Gold, personally, and two of these checks were delivered to Gold and deposited in his personal bank account. The third check, in the sum of $2,000, was retained by Luxenberg.

[25] These and the other facts of the case conflict with the defendants' claims that they were innocent of any complicity in a scheme to defraud Cosmopolitan. Cosmopolitan was in fact defrauded and the judge was justified in inferring that the defendants knew of the scheme and that they willingly participated in it with the intent to injure and defraud Cosmopolitan. We agree with the judge's conclusions that the defendants were guilty as charged of aiding and abetting Mervin Gold in and conspiring to defraud Cosmopolitan in violation of Section 657, Title 18, U.S.C. There is substantial evidence to support each and every finding of fact made by the trial judge.

[26-29] While this appeal was pending in this Court, defendants moved for a new trial on the basis of newly discovered evidence. This Court requested the trial court to certify whether it would grant or deny such motions in the event the case was remanded for a ruling on the matter. At a hearing held on the motions, the newly discovered evidence was found to be affidavits of two attorneys and the testimony of a third to the effect that Mervin Gold stated to them that he had duped Zimmerman and Luxenberg, and exculpating them from any guilt in the matters which were the subject of the indictments. The trial judge denied these motions, and Zimmerman assigns such denial as reversible error. The trial judge found that the "newly

discovered" evidence was not of such a nature that it would probably result in an acquittal on a retrial. The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests primarily within the discretion of the trial judge. And his denial thereof will not be disturbed unless there is a clear abuse of such discretion. *United States v. Johnson,* 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562, rehearing den. 327 U.S. 817, 66 S.Ct. 699, 90 L.Ed. 1040; *United States v. Lewis,* 338 F.2d 137 (C.A. 6), cert. den. 380 U.S. 978, 85 S.Ct. 1342, 14 L.Ed.2d 272; *Ashe v. United States,* 288 F.2d 725 (C.A.6). In order for a trial judge to grant such a motion, the newly discovered evidence must be of such a nature that it will probably result in acquittal on a retrial. A trial judge's finding that the newly discovered evidence is not of this nature will not be disturbed unless a clear abuse of discretion is shown. *Winer v. United States,* 228 F.2d 944 (C.A.6), cert. den. 351 U.S. 906, 76 S.Ct. 695, 100 L.Ed. 1442; *United States v. Crowder,* 351 F.2d 101 (C.A.6). The trial judge found that in view of all the evidence presented at the trial he could give little credence to the alleged statements attributed to Gold to the effect that Zimmerman and Luxenberg were dupes. We cannot say that the trial judge abused his discretion in denying the motion, and therefore find no error in this respect.

The judgments of the District Court are affirmed.

MEMORANDUM OPINION OF DISTRICT COURT DENYING MOTION TO VACATE AND RECONSIDER THE EARLIER DENIAL OF MOTION FOR NEW TRIAL.

(Filed January 22, 1968.)

BATTISTI, *J.*:

On November 15, 1963 this Court found defendants George Zimmerman and Leonard Luxenberg guilty as charged with regard to counts 4 and 5 of the indictment in this case. While their appeals were pending in the Sixth Circuit Court of Appeals, both Mr. Zimmerman and Mr. Luxenberg moved for a new trial on the basis of newly discovered evidence. By an order dated October 14, 1965, the Court of Appeals requested that this Court certify whether it would grant or deny such motions in the event of a remand.

Pursuant to the order of the Court of Appeals, on April 1, 1966 this Court held an oral hearing on the motions for a new trial. At this hearing the defendants offered two live witnesses. In a memorandum opinion dated April 22, 1966, wherein this Court certified that it would deny the defendants motions for a new trial, the Court summarized the testimony of these two witnesses as follows:

> "The first witness, Attorney James R. Willis, formerly represented co-defendant Mervin L. Gold, now deceased in criminal action CR 62-223. Mr. Willis testified that pursuant to a request made by Mr. Gold, he contacted the United States Attorney and proposed a "deal" whereby various criminal cases pending against Mr. Gold could be resolved. According to Mr. Willis, he was authorized to the United States Attorney that Mr. Gold would enter a plea of guilty to certain charges then pending if an arrangement could be worked out whereby a previous sentence of eight

years could be reduced and Mr. Gold be given the right to select the penitentiary to which he would be sent. Mr. Willis further testified that Mr. Gold authorized him to state to the United States Attorney that he would give a statement exonerating the other parties who had been indicted along with himself. Mr. Gold's proposal was flatly refused by the United States Attorney.

The second witness, Attorney A. H. Zychick, was, for a period of time, associated with Attorney Fred W. Garmone in the defense of Mervin Gold in another criminal case in this Court. Mr. Zychick testified that following the termination of his and Mr. Garmone's employment as counsel for Mr. Gold, Mr. Gold would often drop into his office to use the phone and visit with either himself or Mr. Garmone. Mr. Zychick testified that on some of these occasions Mr. Gold made statements concerning Mr. Zimmerman and Mr. Luxenberg. According to Mr. Zychick, Mr. Gold made derogatory comments with regard to Messrs. Zimmerman and Luxenberg and boasted that he had made dupes out of them."

Prior to the April 1, 1966 hearing, Mr. Zimmerman's counsel, George J. McMonagle, had filed an affidavit stating that:

"* * * he does verily believe that James Willis, Attorney, possesses evidence bearing upon the issue in the within action which, in the interest of justice, are important to the defendant and to the court but which will not be disclosed except upon an order of the Court herein."

At the hearing it developed that the "evidence" alluded to in the McMonagle affidavit was information which Mr. Willis had obtained in the context of his attorney-client relationship with Mervin Gold. While the opinion of

April 22, 1966 does not so indicate, the court refused to order the disclosure of such information.

In connection with the motions for new trial on the basis of newly discovered evidence, the defendants also submitted the affidavit of Attorney Fred Garmone. By the date of the hearing, Mr. Garmone had passed away.

After considering the testimony of Messrs. Willis and Zychick and the affidavit of Mr. Garmone, this Court concluded:

> "Viewing the evidence offered in support of the motion for a new trial in conjunction with all of the evidence elicited at the trial, the Court finds that the alleged statements attributed to Mr. Gold to the effect that Mr. Zimmerman and Mr. Luxenberg were dupes is not worthy of credence. While Mr. Gold's role in the unlawful activities might have been more substantial than that of either Mr. Zimmerman or Mr. Luxenberg, the Court finds nonetheless that the Government has established, beyond a reasonable doubt, that the Messrs. Luxenberg and Zimmerman did unlawfully, willfully and knowingly combine, and agree to defraud the Cosmopolitan Small Business Investment Company as charged in Count 4 of the Indictment; and, further, that George Zimmerman and Leonard Luxenberg did aid and abet the commission of the criminal offense set forth in Count 5 of the indictment."

Being of the view that the "newly discovered" evidence would not produce an acquittal in the event of a retrial, the court certified that in the event of a remand the motions for new trial would be denied.

Two days after this Court rendered its opinion in connection with the motions for a new trial, the court reporter who had recorded the proceedings passed away. At the time of his death his shorthand notes had not been transcribed.

In the brief ultimately submitted to the Court of Appeals, defendant Zimmerman raised among others the following question:

> "VI. Was it not error for the trial judge, after post-trial hearing, to overrule the motion of appellant Zimmerman for a new trial based upon newly discovered evidence when attorneys who had represented Mervin Gold testified regarding *non-privileged* statements of Gold wherein Gold had boasted of having made a dupe of Zimmerman who, according to Gold, had not participated in any of Gold's unlawful acts?" (Emphasis supplied; Appellant's brief, p. 32.)

In discussing this question, counsel for Mr. Zimmerman summarized the testimony elicited at the hearing on the motion for a new trial as follows:

> "During the summer of 1965, appellant Zimmerman and his trial counsel were advised that Gold had made certain statements which were exculpatory of Zimmerman. Gold derived great pleasure from "using" persons who had received more formal education than he. He boasted that he had made a dupe of Zimmerman. Gold authorized Attorney James Willis to advise the United States Attorney that if Gold were to receive consideration by way of concurrent sentences and confinement in a certain prison facility, he would exonerate Zimmerman and various other persons who had been, by reason of their association with Gold, charged with offenses and that such exoneration would be representative of the truth. Attorney Willis conveyed the message to the United States Attorney.
>
> Attorney Fred Garmone died prior to the hearing on the motion for new trial. His affidavit was read into the record and bore out the foregoing (275, 276a), as did the testimony of Attorney A. H. Zychick, Garmone's law partner." (Appellant's brief, pp. 32, 33.)

Counsel further noted on page 33 of the brief that:

> "* * * due to the death of the court reporter who took the testimony at the hearing incident to appellant's motion for new trial, appellant is unable to provide a transcript of the testimony concerning said hearing. Such testimony will be made available to the Court as soon as a transcription of the original shorthand notes can be obtained by counsel. The federal court reporter is attempting to locate some person who can effect such transcription in this matter and in various other matters."

While, as just noted, Mr. Zimmerman's appellate brief raised the matter of the unavailability of a transcript of the hearing on the motions for a new trial, absolutely no claim or suggestion was made therein that this Court's summary of the testimony elicited at such hearing was either inaccurate or omitted any details which might be pertinent to the issues raised by the motions. Further, no claim was made that this Court acted improperly in refusing to require the disclosure of "privileged" statements made by Mr. Gold.

In an opinion filed on February 17, 1967, the Court of Appeals affirmed the judgments of this Court, including the denial of the motions for a new trial on the basis of the newly discovered evidence. According to an affidavit which has been filed in connection with the motion here under consideration, counsel for Mr. Zimmerman had exhausted his efforts to obtain a transcript of the hearing on the motions for a new trial at approximately the same time that the Court of Appeals decision was announced.[1]

On May 19, 1967 a petition for rehearing was filed in the Court of Appeals on behalf of Mr. Zimmerman. In

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[1] Because of his unusual shorthand style, the court reporter's notes could not be deciphered.

this petition there was but one brief reference to the matter of the denial of the motions for new trial. This reference was on page 20 of the petition where it was stated:

> "* * * the only reasonable interpretation of the evidence presented is that Appellant and Luxenberg were both duped by Gold. This version is corroborated by the undisputed and unimpeached assertions of three attorneys who had been associated with Gold prior to his death. Gold had told them that Appellant and Luxenberg were innocent of any wrongdoing and Gold boasted to the attorneys "that he had made dupes outt of them" (278a). The trial court rejected this testimony as the basis for a motion for a new trial" (277a-279a).

Defendant Zimmerman's petition for rehearing was denied and the Court of Appeals issued its Mandate on May 29, 1967. No petition for a writ of certiorari was filed on behalf of Mr. Zimmerman.

On June 28, 1967 defendant Mr. Zimmerman, proceeding pursuant to Rule 35 of the Federal Rules of Criminal Procedure, moved for a reduction of sentence. After consideration of this motion, on July 11, 1967 this court amended the original sentence to provide that it was to be served pursuant to 18 U. S. C. A., Section 4208 (a) (2).

On July 17, 1967, defendant Zimmerman filed a motion styled "Motion to Vacate Denial of Motion for New Trial and Request for Reconsideration of Motion for New Trial" (hereafter referred to as "motion to vacate"). It is this "motion to vacate" that is presently before the Court for a decision. In that motion it is urged that this Court's earlier decision on the motions for a new trial should be vacated because defendant Zimmerman was denied an effective appellate review of the following ques-

tions by reason of the unavailability of a transcript of the hearing:

> (1) Whether the testimony produced at the hearing in light of all other evidence produced at the trial, was such as would probably produce a different result upon retrial.
>
> (2) Whether the exclusion of material evidence which the witnesses asserted they possessed, on the ground that such evidence was protected by the attorney-client privilege, operated to deny defendant a fair trial by depriving him of the right of compulsory process.

It is clear that the decision of this Court on Mr. Zimmerman's motion for a new trial on the basis of newly discovered evidence has become "final." It is likewise clear that said decision having been affirmed and the Mandate issued, this Court is without the power to "vacate" and "reconsider" its earlier decision. *United States v. Smith,* 331 U. S. 469 (1947).[2] For this reason alone, defendant Zimmerman's "motion to vacate" must be denied.

While the resolution of particular motion here under consideration does not require the Court to meet Mr. Zimmerman's claim that he has been denied an effective appellate review, the Court feels compelled to make certain observations with regard to that claim. Particularly notable is the fact that it has never been claimed or suggested that this Court's summary of the testimony with regard to the statements attributed to Mr. Gold was either inaccurate or omitted any pertinent details. This seems to be quite understandable in that, as the Court clearly recalls, the statements attributed to Mr. Gold were, with certain exceptions noted in the opinion of April 22, 1966, framed in the broad generalities mentioned in that opinion.

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[2] With regard to the recall of a Mandate, see: *Hines v. Royal Indemnity Company,* 253 F. 2d 111 (CA 6 1958).

With regard to the claim that Mr. Zimmerman was denied an effective appellate review of the Court's ruling on the matter of the attorney-client privilege, it is notable that while recognition was given to the matter of "privilege" in the framing of Question VI of defendant Zimmerman's appellate brief, absolutely no claim was made that this Court erred in refusing to order Attorney Willis to disclose privileged communications. Moreover, it is not disputed that the "evidence" imparted by Mr. Gold to Attorney Willis was privileged "when communicated." (See page 3 of defendant's reply brief filed on October 27, 1967.) Rather, it is urged that since Mr. Gold is now deceased the cloak of the privilege should be withdrawn from his communications with Attorney Willis and, therefore, that this Court erred when it refused to order Attorney Willis to disclose such communications.[3]

For the reason previously assigned the motion here under consideration is denied.

By order of the Honorable Paul C. Weick, Chief Judge of the Sixth Circuit Court of Appeals, execution of sentence was stayed pending disposition by this Court of defendant's "motion to vacate." Bail was set in the amount of One Thousand Dollars ($1,000.00). Having denied defendant Zimmerman's "motion to vacate," the order staying execution of sentence is vacated and the bond cancelled.

FRANK J. BATTISTI,
United States District Judge.

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[3] As previously noted, the Court has concluded that it is without power to here reconsider that ruling. However, in this connection, See: *Pritchard v. United States,* 181 F. 2nd 326 (CA 6, 1950); *Baldwin v. Commissioner of Internal Revenue,* 125 F. 2d 812 (CA 9, 1942). 8 *Wigmore, Evidence,* Section 2323 (3rd Ed. 1940); *Underhill's Criminal Evidence,* 5th Ed., Volume 2, Section 333.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING DISTRICT COURT'S DECISION OF JANUARY 22, 1968.

(Decided January 8, 1969.)

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

PER CURIAM. This is an appeal from denial of a long delayed motion for rehearing of an order denying defendant Zimmerman's motion for new trial on grounds of newly discovered evidence. The denial of the motion for new trial was entered in the District Court April 22, 1966,[1] and was affirmed by this court February 17, 1967, in the same opinion which affirmed defendant's conviction. *United States v. Luxenberg,* 374 F.2d 241 (6th Cir. 1967).

Dealing with the District Court's original denial of defendant's motion for new trial, this court said:

> "In order for a trial judge to grant such a motion, the newly discovered evidence must be of such a nature that it will probably result in acquittal on a retrial. A trial judge's finding that the newly discovered evidence is not of this nature will not be disturbed unless a clear abuse of discretion is shown. Winer v. United States, 228 F.2d 944 (C.A. 6), cert. den. 351 U.S. 906, 76 S.Ct. 695, 100 L.Ed. 1442; United States v. Crowder, 351 F.2d 101 (C.A. 6). The trial judge found that in view of all the evidence presented at the trial he could give little credence to the alleged statements attributed to Gold to the effect that Zimmerman and Luxenberg were dupes. We cannot say that the trial judge abused his discretion in denying the motion, and therefore find no error in

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[1] This order was in the form of a certificate to the United States Court of Appeals for the Sixth Circuit that the District Judge would deny the motion for new trial if the case were remanded by the Court of Appeals.

this respect." *United States v. Luxenberg, supra* at 251.

On review of this entire record, we find no abuse of discretion in the District Court's denial of the motion for rehearing.

Affirmed.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 8, 1969.)

JUDGMENT—Appeal from the United States District Court for the Northern District of Ohio.

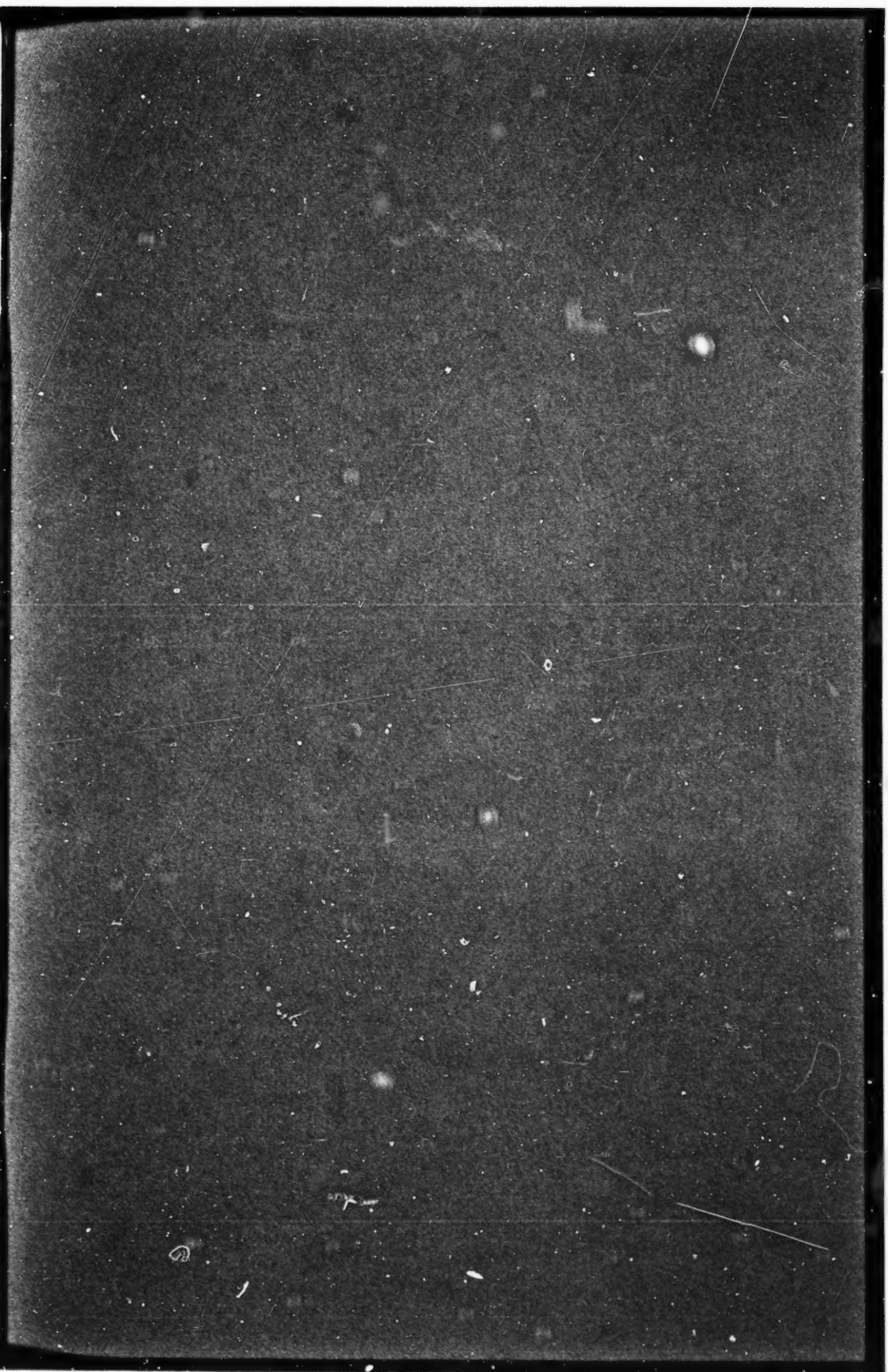
This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(B).

Entered by order of the court.

CARL W. REUSS, *Clerk.*



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835-997—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1026

GEORGE ZIMMERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court certifying that the motion for a new trial on the ground of newly discovered evidence would be denied if the case was remanded by the court of appeals for a ruling thereon (Pet. App. 17–19) is not reported. The opinion of the court of appeals sustaining that determination and affirming the conviction (Pet. App. 20–34) is reported at 374 F. 2d 241. The opinion of the district court denying the motion to vacate and reconsider its prior order (Pet. App. 35–42) is not reported. The *per curiam* opinion of the court of appeals affirming the

denial of the motion to vacate and reconsider (Pet. App. 43–44) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1969 (Pet. App. 44). The petition for a writ of certiorari was filed on February 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after the denial of a motion for a new trial has been affirmed on appeal, a defendant may obtain a new hearing on that motion on the ground that, because of the death of the reporter, the minutes of the original hearing had not been available to the court of appeals, when no claim was made during the pendency of the appeal that the trial judge's summary of the evidence was either inaccurate or insufficient and no effort was made to obtain a more extensive statement of the evidence.

STATEMENT

1. Following a non-jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on counts 4 and 5 of a five-count indictment (R. 1)[1] charging that he and a codefendant named Leonard Luxenberg conspired with one Mervin Gold willfully to misapply $28,000 of the funds of Cosmopolitan Small Business Investment Company, Inc.,

[1] "R." refers to the stamped numbers appearing on the initial pages of the documents contained in the clerk's transcript. "Tr." refers to the reporter's transcript of the trial.

a small business investment company licensed by the Small Business Administration, in violation of 18 U.S.C. 371 and 657 (count 4), and that they aided and abetted Gold in the commission of that substantive offense (R. 151).[2] On June 23, 1965, petitioner was sentenced to 18 months' imprisonment on each count, to run concurrently, and fined $5,000 (R. 172).[3] On February 17, 1967, the court of appeals affirmed (Pet. App. 20–34; 374 F. 2d 241).

The evidence[4] showed that petitioner, an attorney knowledgeable in the operations of the Small Business Administration (SBA), did the legal work, at Gold's request, of incorporating Cosmopolitan Small Business Investment Company, Inc. (Cosmopolitan), and applying to the SBA on its behalf for a license to make loans to small business concerns. Although Gold was the organizer and manager of Cosmopolitan, his name did not appear in any of the documents sub-

[2] Luxenberg, who was tried jointly with petitioner, was also convicted on counts 4 and 5 (R. 151). Gold, who was named as a defendant in all five counts, and whose case was severed as to counts 1, 2, and 3 at the instance of petitioner and Luxenberg (R. 28), had previously been convicted by a jury on each of those counts (R. 108), none of which is involved here. Gold (now deceased) was evidently never tried on counts 4 and 5.

[3] Following the affirmance of the conviction by the court of appeals and pursuant to a motion for reduction under Rule 35 of the Federal Rules of Criminal Procedure, the sentence was amended to provide that the confinement was to be subject to 18 U.S.C. 4208(a)(2) (making the prisoner eligible for parole whenever the Board of Parole deems it appropriate) (R. 193, 198).

[4] See the court of appeals' summary at Pet. App. 21–22, 32–33 (374 F. 2d at 245, 250); the findings of fact made by the trial judge in announcing the verdicts (Tr. 688–694; Tr. 108).

mitted to the SBA. In addition, certain of the documents (prepared by others) accompanying the application for the license falsely represented that Cosmopolitan had $155,000 on deposit in a bank account. Pursuant to Cosmopolitan's request, submitted by petitioner, the SBA issued to the corporation a loan license and "matching funds" in the amount of $150,000. Thereafter, petitioner assisted Gold in causing Cosmopolitan to make a $28,000 loan to a company that was wholly owned by Luxenberg, knowing that the loan was made without adequate security. Out of the proceeds of the $28,000, Luxenberg gave Gold two checks, totaling $26,000, which Gold deposited in his personal account, thus converting the funds to his own use. The remaining $2,000 was used by Luxenberg in his own business. The alleged loan of $28,000 by Cosmopolitan to Luxenberg's company, for which Luxenberg, as president, executed a promissory note, was never repaid.

2. On June 22, 1965, nineteen months after he was found guilty and the day preceding the imposition of sentence,[5] petitioner filed in the district court a motion for a new trial on the ground of newly discovered evidence, supported by an affidavit by Fred Garmone, a former attorney for Gold in connection with a different criminal matter. Garmone stated in the affidavit that Gold—who was then deceased—had told him, subsequent to the termination of his employment as counsel, that petitioner and Luxenberg

[5] Petitioner had made one prior motion for a new trial and it appears from the docket entries that the delay between verdict and sentence resulted, in part, from the consideration of that motion and proceedings relating to the codefendant.

"were dupes" of his in the transactions involved in this case (R. 171; see Pet. App. 18). The district court took no action on the motion during the pendency of petitioner's appeal from his conviction until the court of appeals requested the trial court to advise it whether it would grant the motion if the case was remanded for a ruling thereon (R. 184). On April 1, 1966, pursuant to this request, the trial judge held an evidentiary hearing at which petitioner presented two witnesses—James Willis, a former attorney for Gold in connection with the instant criminal proceedings, and A. H. Zychick, also a lawyer, who, in association with Garmone, had represented Gold in the unrelated criminal case referred to above. Garmone had died prior to the hearing (Pet. App. 17, 18).

On April 22, 1966, the trial judge filed a memorandum opinion certifying that he would deny the motion for a new trial if the case was remanded (Pet. App. 17–19). In the opinion the court summarized the testimony of attorneys Willis and Zychick[6] as follows (Pet. App. 17–18):

> * * * Mr. Willis testified that, pursuant to a request made by Mr. Gold, he contacted the United States Attorney and proposed a "deal" whereby various criminal cases pending against Mr. Gold could be resolved. According to Mr. Willis, he was authorized to propose to the United States Attorney that Mr. Gold would enter a plea of guilty to certain charges then pending if an arrangement could be worked out whereby a previous sentence of eight years

[6] The opinion also summarized the pertinent averments of Garmone's affidavit (Pet. App. 18), which were essentially identical with the live testimony given by Zychick.

> could be reduced and Mr. Gold be given the right to select the penitentiary to which he would be sent. Mr. Willis further testified that Mr. Gold authorized him to state to the United States Attorney that he would give a statement exonerating the other parties who had been indicted along with himself. Mr. Gold's proposal was flatly refused by the United States Attorney.
>
> * * * Mr. Zychick testified that following the termination of his and Mr. Garmone's employment as counsel for Mr. Gold, Mr. Gold would often drop into his office to use the phone and visit with either himself or Mr. Garmone. Mr. Zychick testified that on some of these occasions Mr. Gold made statements concerning Mr. Zimmerman and Mr. Luxenberg. According to Mr. Zychick, Mr. Gold made derogatory comments with regard to Messrs. Zimmerman and Luxenberg and boasted that he had made dupes out of them.

The trial judge certified that he would not order a new trial in the event of a remand because he was of the opinion that the proffered evidence was not of such a character as would probably result in a verdict of not guilty at a new trial (Pet. App. 18–19). "Viewing the evidence offered in support of the motion for a new trial in conjunction with all of the evidence elicited at the trial," he concluded (Pet. App. 19),

> the Court finds that the alleged statements attributed to Mr. Gold to the effect that Mr. Zimmerman and Mr. Luxenberg were dupes is not worthy of credence. While Mr. Gold's role in the unlawful activities might have been more

> substantial than that of either Mr. Zimmerman or Mr. Luxenberg, the Court finds nonetheless that the Government has established, beyond a reasonable doubt, that Messrs. Luxenberg and Zimmerman [were guilty as charged].

At the hearing on the motion for a new trial, petitioner's counsel had sought to elicit from attorney Willis certain information which Gold had allegedly communicated to Willis while he was Gold's lawyer, and which it was contended would exonerate petitioner. After satisfying himself through inquiry that the information in question had been communicated to Willis by Gold "in the context of" their attorney-client relationship, the judge ruled that, notwithstanding Gold's intervening death, Willis would neither be required nor permitted to divulge it (Pet. App. 36–37, 42; Pet. 6, 8).

The court reporter who recorded the proceedings at the hearing died shortly following the filing of the judge's opinion, without having transcribed his notes (Pet. App. 37). Subsequent efforts by petitioner to find someone who could decipher the notes were unsuccessful (Pet. 5–6). As a consequence, the judge's summary of the testimony of attorneys Willis and Zychick at the hearing, as set forth above, is the only record of their testimony.

3. In his appeal from the denial of the new trial motion, petitioner at no time contested the trial judge's decision not to require disclosure of the privileged information which Gold had communicated to attorney Willis as his lawyer (Pet. App. 39). The only error alleged was the refusal to grant a new trial on the

basis of the "non-privileged" statements of Gold to the attorneys (Pet. App. 38). Also, although petitioner alluded in his brief to the death of the court reporter and the consequent unavailability of a transcript of the testimony taken at the hearing,[7] he did not suggest that the judge's summary of the testimony was either inaccurate or insufficient (Pet. App. 39). No request was made that the court of appeals defer decision of the appeal until a transcript became available, or until a settled and approved reconstructed record could be obtained (see *infra,* pp. 11–12), nor was it ever suggested that the absence of a transcript was prejudicial (R. 205, Memorandum, p. 3).

The court of appeals affirmed petitioner's conviction—and the refusal to grant a new trial—on February 17, 1967 (Pet. App. 20–34; 374 F. 2d 241). On May 19, 1967, petitioner filed a petition for rehearing of the appeal, but petitioner again made no claim that the absence of a transcript of the testimony taken at the hearing had prejudiced his appeal on that issue—indeed the absence of a transcript was not mentioned. Similarly, the petition did not raise any question as to the propriety of the trial judge's ruling on the "privileged communication" issue (Pet. App. 39–40). The petition was denied and review by this Court was not sought.

4. On July 17, 1967, after the district court had granted a motion by petitioner for a reduction of his sentence under Rule 35 of the Federal Rules of Crim-

[7] He advised the court that efforts were being made to find someone who could transcribe the deceased reporter's notes and that a transcript would be provided as soon as one was available.

inal Procedure to the extent that the sentence was amended to provide that it was to be subject to 18 U.S.C. 4208(a)(2) (making him immediately eligible for parole) (R. 193, 198), petitioner filed in the district court a motion to vacate and reconsider the denial of the motion for a new trial (R. 199). The motion alleged that, owing to the unavailability of a transcript of the proceedings on the motion for a new trial, petitioner (1) had been precluded from obtaining "effective appellate review" of the denial and (2) had been prevented from effectively litigating in the court of appeals the question whether the trial judge's decision of the "privileged communication" issue had deprived petitioner of compulsory process for obtaining witnesses in his favor in violation of the Sixth Amendment. On January 22, 1968, the trial judge filed a memorandum opinion denying the motion (Pet. App. 35–42). He held that, because his decision denying the motion for a new trial had become final and had been affirmed by the court of appeals, he had no authority to vacate or reconsider it (Pet. App. 41). He further indicated, however, that even if he had power to grant the motion he would deny it as a matter of discretion for lack of merit (Pet. App. 41–42). The court of appeals affirmed (Pet. App. 43–44).

ARGUMENT

Since the order denying the motion for a new trial had become final and had been affirmed by the court of appeals, the trial judge correctly held that he had no authority—without the court of appeals' permission—

to vacate and reconsider the denial. *United States* v. *Smith,* 331 U.S. 469. In any event, as the trial judge noted, and as the court of appeals essentially held,[8] the motion to vacate had no merit.

1. The principal claim of the motion to vacate—that the unavailability of a transcript of the testimony taken at the hearing on the motion for a new trial had precluded petitioner from obtaining "effective appellate review" of the order of denial—was both insubstantial and a patent afterthought.

The essential aspects of the testimony of attorneys Willis and Zychick at the hearing—including Zychick's testimony that Gold had told him that he had made "dupes" of petitioner and Luxenberg in the transactions involved at bar—were summarized in the trial judge's memorandum opinion. At no time during the appeal from the judge's denial of a new trial did petitioner claim or suggest that the judge's summary of the witnesses' testimony was either inaccurate or lacking in pertinent detail. While the record reflects that at the time petitioner filed his court of appeals brief he was still hopeful that he would be able to find someone who could transcribe the deceased reporter's notes, at no time during the pendency of the appeal did petitioner either ask the court to defer its decision of the appeal until a transcript could be obtained or suggest that the available record materials were deficient as a basis for decision. Not even after the court of appeals had af-

[8] The court of appeals treated the denial of the motion by the trial judge as having been made in the exercise of discretion and found "no abuse" in the ruling (Pet. App. 44).

firmed the conviction and the contested order did petitioner suggest that he had been prejudiced by the absence of a transcript. It is significant that petitioner does not even now suggest any respect in which the trial judge's summary of the testimony was inadequate as a basis for appellate review (Pet. 9–12).

If petitioner had thought that the trial judge's summary of the testimony adduced at the hearing was an inadequate basis for decision of the appeal, there were means at his disposal for securing a more adequate record. Former Rule 75(c) of the Federal Rules of Civil Procedure (now Rule 10(c) of the Federal Rules of Appellate Procedure)—which during the pendency of the appeal [9] was applicable to criminal appeals under former Rule 39(b)(1) of the Federal Rules of Criminal Procedure [10]—provided that, if no transcript of the proceedings was available the parties to an appeal could prepare a statement of the evidence from the best sources available, including their recollections, and submit it to the trial court for settlement and ap-

[9] Rule 75(c) became effective as of July 1, 1966, at which time the appeal from the denial of the motion for a new trial was pending (the oral argument had not yet been heard, see R. 205, Memorandum, p. 1). The substance of the Rule had in any event been previously contained, without significant variation, in Rule 75(n).

[10] Rule 39(b)(1) provided: "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules." Rule 39 was abrogated, effective as of July 1, 1968, because its provisions are now covered by the Federal Rules of Appellate Procedure (see Note of the Advisory Committee).

proval; and that, as settled and approved, the statement would constitute the record of the proceedings."[11] Since petitioner took no steps under that authorized procedure to secure a more complete record of the testimony taken at the hearing than that contained in the trial judge's summary, he cannot now be heard to complain that he was prejudiced by the absence of a transcript.

2. What we have said applies with equal force to petitioner's contention (Pet. 12–14) that because of the absence of a transcript he was precluded from effectively litigating in the court of appeals the question whether the trial judge's decision of the "privileged communication" issue violated petitioner's Sixth Amendment right to compulsory process for obtaining evidence in his favor. That contention was not raised in petitioner's appeal from the denial of a new trial and petitioner's suggestion that the absence of a transcript prevented him from even seeeking review of that issue (Pet. 14) is clearly unsound. Had he deemed the record inadequate for presentation of the issue, he

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[11] The rule, specifically, provided:

"(c) *Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable.*

"If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

could have taken steps to obtain a settled and approved reconstructed record under the procedure referred to above. In any event, the trial judge's ruling that the attorney-client privilege belongs to and is waivable only by the client, and survives the death of the client, was correct. 8 Wigmore, *Evidence* (3d ed. 1940), §§ 2321, 2323; 3 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 800, 812, 813; 2 Underhill, *Criminal Evidence* (5th ed. 1956), §§ 328, 333.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

MARCH 1969.

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[12] In *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner at Pet. 13, the Court expressly noted that nothing in the opinion was to be construed as disapproving testimonial privileges, including the attorney-client privilege, since such privileges are based on different considerations from those underlying the common-law disqualifications for interest, involved in that case (388 U.S. at 23, n. 21).

U.S. GOVERNMENT PRINTING OFFICE: 1969